1996

# The State of Utah v. Clarence J. Franklin : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| CLARENCE J. FRANKLIN, | : | Case No. 960161-CA<br>Priority No. 2 |
| Defendant/Appellant. | : | |

**REPLY BRIEF OF APPELLANT**

Appeal from a judgment of conviction for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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## INTRODUCTION

Defendant/Appellant Clarence J. Franklin ("Appellant" or "Franklin") refers this Court to the Jurisdictional Statement, Statement of the Issue, Text of Determinative Statutes, Statement of the Case, Statement of the Facts, and Argument in his opening brief. Appellant replies as follows.

## ARGUMENT

POINT. THE CRIME "BRANDISHING" A WEAPON CONTAINS THE SAME ELEMENTS AS AGGRAVATED ASSAULT UNDER THESE CIRCUMSTANCES.

The State is correct that in State v. Verdin, 595 P.2d 862 (Utah 1979), the Utah Supreme Court considered whether the crimes of aggravated assault and drawing or exhibiting a weapon in a threatening manner contain identical elements. With very little discussion, the Court concluded that in the context of that case aggravated assault and exhibiting a weapon involved different crimes. The Court stated:

> Credible evidence in this case establishes all the elements of the higher crime, i.e., that Verdin aimed a deadly weapon, a loaded rifle, at a police officer, worked the action to put a

> shell into a firing chamber, and attempted to pull the trigger while declaring his intention to "smoke" the officer. This is quite a different and more reprehensible course of action than exhibiting a dangerous weapon in a threatening manner.

Id. at 863. While Verdin does support the State's position, it is distinguishable in that the evidence in this case does not establish that Franklin aimed a loaded weapon, Franklin's alleged threat was a more general statement in the midst of profanities which apparently was not construed as a threat since David and/or Josh moved closer to Franklin after the statement, Franklin did not embellish on the threat by working the action, and Franklin did not pull the trigger while making a direct threat. Instead, according to the State's witnesses, Franklin's hand was hanging out the car window with a gun in it; he pointed the gun, which David initially thought was a toy, at David. R. 234-37. Then "he jumped back . . . closed the door and said, 'Let's go.'" R. 237-38.

In State v. Oldroyd, 685 P.2d 551 (Utah 1984), the Utah Supreme Court considered whether the trial court erred in refusing to give the defendant's requested lesser included offense instruction for exhibition of a deadly weapon in a threatening manner. The Court pointed out that the test for determining whether a lesser included offense instruction which is requested by a defendant must be given is whether there is "some overlapping of the statutory elements of the offenses." Id. at 553. The crimes of aggravated assault and exhibiting a deadly weapon have elements in common since "[b]oth require a

form of threat and both require the use of a weapon." Id. at 554. The Oldroyd Court clarified its holding in Verdin, stating:

> The [Verdin] Court affirmed the conviction and sentence for aggravated assault, saying that the evidence in the case established all the elements of the higher crime and that under the facts of that case the distinction in the level of proscribed conduct was clear.

Id. (emphasis added). The Oldroyd Court further noted that

> in Verdin [the evidence] clearly established all of the elements of aggravated assault: Verdin used a deadly weapon (a loaded rifle) in making a threat to do bodily injury to another (declaring his intention to "smoke" the police officer), accompanied by a show of immediate force or violence (working the rifle action to put a shell in the firing chamber and attempting to pull the trigger while aiming the rifle at the police officer).

Id. at 555.

In the present case, the distinction between the two crimes is not as clear as it was in Verdin; indeed, under these facts, identical elements support both crimes. Both crimes involve "a form of threat and both require the use of a weapon." Oldroyd, 685 P.2d at 554. Neither Verdin nor Oldroyd expressly make the distinction drawn by the State that aggravated assault requires a threat of bodily injury whereas the crime of brandishing a weapon occurs when the weapon is merely displayed, and "[t]he defendant may be guilty of threatening even though there is no threat made or intended." State's brief at 12. In fact, Oldroyd appears to contradict this claim by the State since it expressly states that both crimes involve a "form of threat." Oldroyd, 685 P.2d at 554.

Additionally, the State does not clarify whether its claimed distinction requires an express threat to do bodily injury or whether implied threats based on the use of a dangerous weapon are sufficient to elevate the crime from the crime of brandishing to the crime of aggravated assault. Neither statute explicitly requires an express threat, and an express threat to do harm presumably would be a "form of threat" which would fit the requirements of either statute. Additionally, any time a gun is drawn or exhibited in an angry or threatening manner, a threat to do bodily injury is implied. Hence, drawing a gun in an angry or threatening manner would be a "form of threat" under either statute. In this case, where witnesses testified that Franklin pointed a gun while voicing a threat, the statutes required identical elements.

The immediate show of force which was present in Verdin where the defendant "work[ed] the rifle action to put a shell in the firing chamber and attempt[ed] to pull the trigger while aiming the rifle at the police officer" (Oldroyd, 685 P.2d at 551) is not present in this case. Accordingly, the conviction for aggravated assault should be reversed and judgment entered for threatening with or using a dangerous weapon in fight or quarrel, a class A misdemeanor.

## CONCLUSION

Defendant/Appellant Clarence J. Franklin respectfully requests that this Court reverse his conviction and remand this

case for resentencing on the charge of threatening with or using a dangerous weapon in fight or quarrel, a class A misdemeanor.

SUBMITTED this 10th day of April, 1997.

Joan C. Watt

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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 10th day of April, 1997.

Joan C. Watt

JOAN C. WATT

DELIVERED this _____ day of April, 1997.